

ARNOLD & PORTER

1200 NEW HAMPSHIRE AVENUE, N. W.

WASHINGTON, D. C. 20036

(202) 872-6700

CABLE: 'ARFOPO'

TELECOPIER: (202) 872-6720

TELEX: 89-2733

PARK AVENUE TOWER

65 EAST 55TH STREET

NEW YORK, NEW YORK 10022-3219

(212) 750-5050

1700 LINCOLN STREET

DENVER, COLORADO 80203

(303) 863-1000

WILLIAM EDRO COOK, JR.

DIRECT LINE: (202) 872-6996

February 16, 1994

BY HAND

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

FES

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Comments of New York City Department of
Telecommunications and Energy in
ET Docket No. 93-7

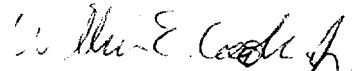
Dear Mr. Caton:

Please find enclosed, on behalf of the New York City Department of Telecommunications and Energy, an original and eleven copies of reply comments in the above-referenced proceeding.

Any questions regarding the submission should be referred to Eileen Huggard, Assistant Commissioner of the Department, at (212) 788-6549.

Thank you for your attention to this matter.

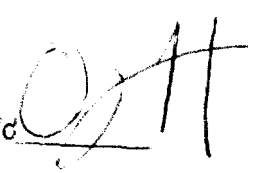
Sincerely,



William E. Cook, Jr.

Enclosures

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Implementation of Section 17
of the Cable Television
Consumer Protection and
Competition Act of 1992

Compatibility Between
Cable Systems and Consumer
Electronics Equipment

ET Docket No. 93-7

To: The Commission

**REPLY COMMENTS OF THE NEW YORK CITY
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

Eileen E. Huggard
Assistant Commissioner
Cable Television Franchises
and Policy
Gary S. Lutzker
Telecommunications Policy
Analyst

75 Park Place
Sixth Floor
New York, New York 10007
(212) 788-6540

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SUMMARY

The New York City Department of Telecommunications and Energy ("City of New York" or "City") specifically recommends the following in addition to our previously filed comments in this proceeding:

- The Commission should implement the proposed short-term measures, as modified by the City's prior recommendations, in accordance with the timetable described in the NPRM.
- The Commission should prohibit cable television operators from charging subscribers separately for the installation of supplemental equipment needed to correct incompatibilities between the cable system and consumer equipment that are caused by the operator's security system.
- The Commission should prohibit cable systems from scrambling any signal carried on the basic service tier, and only operators who were scrambling the basic tier on the effective date of the 1992 Cable Act should be permitted to continue scrambling during the pendency of a waiver request.
- With regard to long-term measures, the Commission should consider extending the effective date of any proposals for new equipment to allow for participation within the Cable-Consumer Electronics Compatibility Advisory Group ("CAG") of additional interested parties, and to allow the Commission ample time to consider fully the ramifications of any new standards it may promulgate.
- The Commission should ensure, if possible, that only security functions be reserved to system equipment provided by the cable operator.
- The Commission should require cable operators to provide component descramblers/decoders for all subscriber equipment with a Decoder Interface connector, and not allow separate charges for the equipment or its installation.

The City believes that the current proceeding is a critical one for consumers, cable television operators, equipment manufacturers, and retailers. We therefore respectfully urge the Commission to consider fully the interests of the public and other parties who have not been included within the Compatibility Advisory Group.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Compatibility Between)
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ET Docket No. 93-7

To: The Commission

**REPLY COMMENTS OF THE NEW YORK CITY
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

The New York City Department of Telecommunications and Energy ("City of New York" or "City") submits these reply comments in response to various comments filed on January 25, 1994, concerning the Federal Communications Commission's ("FCC" or "Commission") Notice of Proposed Rule Making ("NPRM" or "Notice")¹ in the above-captioned proceeding.

¹ Implementation of Section 17 of the Cable Television Consumer Protection and Competition Act of 1992 -- Compatibility Between Cable Systems and Consumer Electronics, adopted November 10, 1993 (FCC 93-495) (hereinafter "NPRM").

1. INTRODUCTION

Section 17 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act")² states the congressional finding that "cable operators should use technologies that will prevent signal theft while permitting consumers to benefit from" the advanced features found in modern television receivers and video cassette recorders.³ The legislative intent is to balance the cable operators' legitimate security interests with the public's interest in securing the full value of their electronic equipment.

In regulating the cable operators' use of technologies that interfere with the functions of subscribers' television receivers or video cassette recorders, the 1992 Cable Act confers upon the Commission broad authority to "determine whether and, if so, under what circumstances to permit cable systems to scramble or encrypt signals or to restrict cable systems in the manner in which they encrypt or scramble signals."⁴ Congress, apparently, was aware that the most significant compatibility problems arise due to signal scrambling security systems used by cable operators, and the concomitant use of set-top converter/descramblers whose tuners currently provide only a single output channel and are capable of descrambling only one channel at a time.⁵

The City believes that the Commission should implement the proposed short-

² Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), Pub. L. No. 102-385, 106 Stat. 1460, § 17, codified at 47 U.S.C. § 544A (adding a new Section 624A to the Communications Act of 1934).

³ Id. 47 U.S.C. § 544(a)(3) (1993).

⁴ 47 U.S.C. § 544A(h)(2).

⁵ This conclusion is confirmed in the Commission's report to Congress concerning compatibility issues, which was compiled with extensive inter-industry cooperation. See Report to Congress On Means for Assuring Compatibility Between Cable Systems and Consumer Electronics Equipment, adopted October 5, 1993 ("Compatibility Report"), at 31.

term measures, as modified by the City's prior recommendations,⁶ in accordance with the timetable described in the NPRM.⁷ With regard to long-term measures, however, the City recommends that the Commission consider a limited extension of the effective date of proposals for new equipment to allow for participation within the Cable-Consumer Electronics Compatibility Advisory Group ("CAG") of additional interested parties, and to allow the Commission ample time to consider fully the ramifications of any new standards it may promulgate.

We note that although more than twenty-five parties submitted comments in response to the NPRM, only the City of New York primarily sought to represent the consumers' interest. The City respectfully recommends that the Commission carefully consider such interests, which may not have received adequate treatment in the submissions of other parties who have significant pecuniary interests in the rules ultimately to be adopted by the Commission.

II. DISCUSSION

A. Proposals for Existing Equipment

- 1. Cable television operators should be prohibited from charging subscribers separately for the installation of supplemental equipment needed to correct incompatibilities between the cable system and consumer equipment.**

Many cable system operators choose to encrypt (i.e., scramble) their signals rather than employ other security methods because encryption is the state-of-the-art cable

⁶ See Comments of the New York City Department of Telecommunications and Energy, dated Jan. 25, 1994 in ET Docket No. 93-7, Implementation of Section 17 of the Cable Television Consumer Protection and Competition Act of 1992 -- Compatibility Between Cable Systems and Consumer Electronics ("Equipment Compatibility").

⁷ NPRM at para. 17.

television security system,⁸ and has provided operators with significant benefits that include increased penetration levels. Moreover, operators derive substantial revenues from the sale of unregulated pay-per-view services that are made possible by addressable set-top devices.⁹ Such devices, or similar ones, are required where scrambling is employed.

The equipment used for signal encryption is located in the system's head-end and is included as an element of the general cable network. Cable operators recover the cost of such equipment through charges for both regulated and unregulated services. All subscribers consequently pay to enable the system operator to encrypt its signal, regardless of whether an individual subscriber is receiving scrambled signals. The need for and functions of signal encryption equipment are dictated by cable system security and operations. Therefore, considering such equipment as part of the cable system plant is entirely reasonable.¹⁰

In contrast, the equipment used to decode the encrypted signal is located in the subscriber's premises and is included as an element "of the equipment used to receive the basic service tier."¹¹ Cable operators recover the cost of the converter box through

⁸ See Comments of the New York City Department of Telecommunications and Energy, dated March 22, 1993 ("NOI Comments"), at appendix A, in response to the Notice of Inquiry ("NOI") adopted by the Commission on January 14, 1993, Notice of Inquiry, ET Docket No. 93-7, 8 FCC Rcd 725 (1993).

⁹ In the New York City franchise area, pay-per-view in 1992 generated \$4,567,323 for Paragon Cable (5.6% of revenue); \$3,992,798 for Time Warner Cable of NYC ("TWCNYC")/Manhattan (3.3% of revenue); \$3,551,851 for TWCNYC/Brooklyn (9.8% of revenue); and \$2,863,517 for TWCNYC/Queens (5.8% of revenue). Cable World, Jan. 31, 1994 at 15A.

¹⁰ See 47 C.F.R. § 76.922.

¹¹ 1992 Cable Act, § 623(b)(3), 47 U.S.C. § 543 (b)(3) (1993).

installation and leasing fees pursuant to Commission regulations.¹² Such regulations require that rates for equipment, installation, and additional outlets must be unbundled from each other and from rates for basic service. Thus, only customers who lease converters pay for decoding equipment, but they pay for such equipment regardless of whether they receive signals that require decoding.

In practice, however, this is a distinction without a difference. In many cable systems, nearly all cable television subscribers are required to lease a set-top converter box and remote control from the system operator either to access services provided on the system, to minimize interference, to decode encrypted signals on the basic and cable programming tiers, or to provide extended tuning functions for television receivers and video cassette recorders ("VCR") that are not "cable ready." In other words, the decoding functions of the set-top device have been "bundled" together with other features such as tuning, addressability, shielding, and program selection. Unfortunately for subscribers, however, the cable operators' chosen configuration has inured to the subscribers' detriment by preventing the use of features commonly found in modern television receivers and VCRs.

In contrast, this configuration has provided cable system operators with significant benefits. In addition to the increase in penetration noted above, operators receive substantial pay-per-view revenues and realize significant savings made possible by addressable set-top devices.¹³ In addition, cable operators have extended their de facto monopoly in the provision of cable television service to include a monopoly over the hardware associated with that service.

¹² Id. See Rate Regulation, Report & Order and Further Notice of Proposed Rule Making, FCC 93-177, MM Docket 92-266, 8 FCC Rcd 5631 (1993), at paras. 273, 287-88.

¹³ See supra, note 9.

The 1992 Cable Act addresses these issues by directing the Commission to determine whether to permit or restrict signal encryption that interferes with the functions of subscribers' television receivers or video cassette recorders,¹⁴ and to promulgate regulations as are necessary "to promote the commercial availability, from cable operators and retail vendors that are not affiliated with cable systems, of converter boxes and of remote control devices compatible with converter boxes."¹⁵

In the short term, the Commission proposes to require that cable operators provide subscribers upon request with supplementary equipment to ameliorate incompatibility problems created by the operators chosen security measures.¹⁶ This requirement properly places upon cable operators the responsibility to correct these problems.

The proposed rule, however, would allow cable systems to charge for both the supplementary equipment and its installation in accordance with the rate regulation rules for customer premises equipment used to receive the basic service tier.¹⁷ On the contrary, cable operators should be prohibited from charging separately for installation of such supplementary equipment under the rate regulation rules. Subscribers who wish to enjoy the intended benefits of Section 17 of the 1992 Cable Act will be forced, under the proposed rule, to pay substantially higher monthly rental fees for supplementary equipment that is necessitated by the operator's decision to scramble signals,¹⁸ and should not also be forced

¹⁴ 47 U.S.C. § 544(b)(2).

¹⁵ 47 U.S.C. § 544(c)(2)(C).

¹⁶ NPRM, para. 12.

¹⁷ See 47 C.F.R. § 76.923.

¹⁸ In the Time Warner Manhattan franchise area, for example, the monthly charge for a standard set-top converter is currently \$3.22. In contrast, the charge for a "Watch & Record" converter is \$5.13, which is approximately sixty percent above the cost of the

to pay separately for the installation of such equipment,¹⁹ which is required to correct a compatibility problem created by the operator's choice of a particular security system. Furthermore, such a prohibition will provide cable operators with an incentive to inform subscribers fully of equipment options at the time of the initial installation, and to promote more efficient and less costly installation practices.

The installation cost for mandated supplementary equipment should be borne by the parties whose conduct has made such equipment necessary. The City believes cable operators will recover such expenses through revenues that the set-top device makes possible, such as those generated by pay-per-view services. Subscribers, who in one way or another pay for the equipment that encrypts signals, for the equipment that decodes the signal, and for the signal itself, should not be burdened with the installation cost of equipment required to correct operator-imposed compatibility problems.

2. **Subject to the Commission's waiver procedures, cable systems should be prohibited from scrambling any signal carried on the basic service tier.**

Pursuant to the authority that the 1992 Cable Act confers upon the Commission,²⁰ the Notice proposes to prohibit cable systems from scrambling signals on the basic tier of cable service.²¹ Many commentators, including the Cable-Consumer Electronics Compatibility Advisory Group and the City of New York, view the proposed general prohibition against scrambling any channel on the basic service tier as a reasonable

standard converter.

¹⁹ In New York, installation charges may be as high as \$60.00.

²⁰ See 47 U.S.C. § 544(b)(2).

²¹ NPRM, para. 13.

restriction on cable systems that is consistent with the purposes of Section 17.²²

Such a prohibition will tend to ensure that reception of at least the basic tier will not require the use of a set-top device.²³ Further, consumer confusion and inconvenience will be minimized by requiring that all signals carried on the basic tier be delivered in the clear, and therefore in a form most compatible with consumer equipment.

Cable operators who can affirmatively justify encryption because of unusual circumstances, however, are of course permitted to seek a timely waiver of the scrambling prohibition from the Commission.²⁴ As one commentator suggested, such unusual circumstances might include regions where cable television service is provided to a large proportion of seasonably occupied dwellings,²⁵ if the Commission, after review, so concluded.

Contrary to the recommendations of other parties to this proceeding, however, only those operators who were scrambling the basic tier on the effective date of the 1992 Cable Act should be permitted to continue scrambling during the pendency of a waiver request. The prohibition should not be grandfathered to permit all operators currently encrypting the basic service tier to continue to do so pending the Commission's determination of a waiver request. To do so would unnecessarily provide cable operators with an incentive

²² See Comments of the New York City Department of Telecommunications and Energy, dated Jan. 25, 1994, at 5-6; Comments of the Cable-Consumer Electronics Compatibility Advisory Group, dated Jan. 25, 1994, at 5 in ET Docket No. 93-7, Equipment Compatibility.

²³ The minimum contents of the basic service tier are prescribed both in the statute and in the Commission's rules. See 47 U.S.C. § 543(b)(7); 47 C.F.R. § 76.901.

²⁴ Of course, cable operators should be permitted to scramble signals on the basic service tier if the franchise agreement imposes such an obligation.

²⁵ See Comments of Time Warner Entertainment Company, L.P., dated Jan. 25, 1994, at 5, in ET Docket No. 93-7, Equipment Compatibility.

to evade the intent of the 1992 Cable Act.

B. Proposals for New Equipment

The City has long believed that a complete solution to compatibility problems can only be achieved through both inter-industry cooperation and consultation with government regulatory agencies.²⁶ In fashioning standards and regulations designed to promote the goals of Section 17 for the long term, the Commission has an opportunity to forestall future incompatibilities, promote competition, and ultimately serve the public interest. The accomplishment of these goals will be frustrated, however, if new regulations are adopted prematurely. The Commission should therefore consider a limited extension of the effective date of proposals for new equipment to allow for participation within the Cable-Consumer Electronics Compatibility Advisory Group ("CAG") of additional interested parties, and to allow the Commission ample time to consider fully the ramifications of any new standards it may promulgate.

²⁶ In accordance with its comments in response to the Notice of Inquiry ("NOI") adopted by the Commission on January 14, 1993, Notice of Inquiry, ET Docket No. 93-7, 8 FCC Rcd 725 (1993), the City continues to believe that effective solutions will not be reached unless all affected and interested groups are involved in the process. See Comments of the New York City Department of Telecommunications and Energy in ET Docket No. 93-7, dated March 22, 1993 ("NOI Comments"). See also letter dated April 17, 1991 from William F. Squadron, Commissioner of the New York City Department of Telecommunications and Energy, to Alfred Sikes, then Chairman of the FCC.

1. **To avoid monopolization of the market for descrambler/decoder hardware, only security functions should be reserved to system equipment provided by the cable operator.**

If technically feasible, as some commentators suggest,²⁷ the access control functions of the proposed component descrambler/decoder must be segregated from other features so that cable operators will be forestalled from monopolizing the market for such devices. Sound public policy militates against allowing cable operators a monopoly over all the equipment associated with the services that the operator provides. The operator's only legitimate proprietary interest in this regard is signal protection. Assuming that access control functions can be separated from other descrambler/decoder features, cable operators should not be permitted to control the market for these devices just because they have a legitimate interest in the prevention of signal theft. The public interest will be better served if only security functions are reserved to system equipment provided by the cable operator.

Under the current regime, where access control and other features are bundled together in the set-top device, there is little competition in the manufacturing market for them and no competition in terms of the commercial availability envisioned by the 1992 Cable Act.²⁸ Complying with the statutory mandate to promote such competition will be difficult or impossible unless access control functions, which serve legitimate security interests, are separated from other features commonly found in subscriber premises equipment. The combination of these functions in one piece of operator-owned equipment ossifies the cable operators' bottleneck control of a communications medium and improperly promotes

²⁷ See Comments of the Titan Corporation, dated Jan. 25, 1994, and Comments of Circuit City Stores, Inc., dated Jan. 25, 1994, in ET Docket No. 93-7, Equipment Compatibility.

²⁸ 47 U.S.C. § 544A(c)(2)(C).

extension of their practical monopoly to the market for subscriber premises equipment. The City respectfully suggests that the Commission determine whether the modular access control system proposed by commentators Titan Corporation and Circuit City Stores, Inc. is a viable alternative to the less competitive long-term proposals contained in the Notice, and, if so, to adopt it or some similar standard.

The Commission and the public will benefit if more time is taken to properly consider the most appropriate manner in which to achieve a more competitive future market. The statutory mandate will be fulfilled by timely adoption of the short-term measures proposed in the Notice,²⁹ as modified by the City's prior comments in this proceeding. Beneficial long-term measures need to be carefully considered prior to implementation because hastily adopted regulations likely will create even greater unforeseen problems in the future.

2. **Cable television operators should be required to provide a component descrambler/decoder for all subscriber equipment that is supplied with a Decoder Interface connector, and should not be permitted to apply separate charges either for the equipment or its installation.**

Assuming that the standards proposed in the Notice are adopted, the Commission properly concluded that operators must be required to provide subscribers with equipment to descramble authorized encrypted signals, and that such equipment should be included as an element of the general cable network.³⁰

Operator equipment used to descramble signals at the subscribers' premises should be accorded the same treatment as operator equipment used to scramble signals at the

²⁹ See 47 U.S.C. § 544A(b)(1).

³⁰ NPRM, para. 30.

system's head-end. Disparate treatment for equipment performing complementary functions is inconsistent with sound policy and common sense. Contrary to the comments of other parties,³¹ including the cost of such equipment and its installation within general cable network costs is fair to all cable subscribers. The need for both scrambling and descrambling equipment is dictated by system operations and the operator's choice of a particular security system. Inasmuch as all subscribers pay for the operator's encryption equipment through service fees, fairness compels the conclusion that all subscribers who benefit from these services similarly share the cost of the operator's decryption equipment and its installation.

On the other hand, allowing cable television operators to charge separately for the component descrambler/decoder and its installation will reward operators for creating equipment compatibility problems by providing them with additional equipment and installation revenues. The intent of Section 17 is clearly to the contrary. The Act empowers the Commission to prohibit entirely the use of encryption where it interferes with the functions of subscribers' television receivers and video cassette recorders.³² Since the Commission has determined that operators may continue to use encryption technologies despite their interference with subscribers' equipment, it may, consistent with the statute, determine "under what circumstances to permit cable systems to scramble or encrypt signals or to restrict cable systems in the manner in which they encrypt or scramble signals."³³

If cable system operators are permitted to charge separately for the component

³¹ See, e.g., Comments of Time Warner Entertainment Company, L.P., dated Jan. 25, 1994, at 14-17, ET Docket No. 93-7, Equipment Compatibility.

³² 47 U.S.C. § 544A(b)(2).

³³ Id.

descrambler/decoder and its installation, they will have no incentive to contain costs in the absence of effective competition. As a result, subscribers could be faced with substantial monthly charges for "gold-plated" premises equipment loaded with additional features for the operators' benefit. In addition, this will simultaneously tend to restrain competition in the market for the manufacture of such devices, contrary to legislative intent.

If, on the other hand, the costs associated with component decoder/descramblers are treated as elements of the general cable network, operators will recover such costs through subscriber revenues from regulated services,³⁴ and will have an incentive to keep such costs at a reasonable level. The City believes that revenues from both regulated and unregulated services must be considered with respect to the manner in which operators recover these costs. Inasmuch as these devices will provide operators with substantial unregulated revenues, such income should be included with revenue from regulated services in any cost-recovery calculation.

3. **To ensure long-term resolution of compatibility issues, the Commission should encourage expansion of the Cable-Consumer Electronics Compatibility Advisory Group to include additional interested parties.**

In light of the many comments filed in this proceeding, and the important public interests at stake, the Commission should carefully consider comments from all interested parties in fashioning long-term solutions to the equipment compatibility issues raised by the 1992 Cable Act. The public interest must prevail over the self-interest of parties such as cable television operators and equipment manufacturers seeking to maintain or expand their monopoly status.

³⁴ See 47 C.F.R. § 76.922.

The City therefore recommends that the Commission extend the date for implementation of any proposals for new equipment. To ensure, however, that consumers receive the benefits that Section 17 intends, such extension should be limited in duration. In the interim, participation within the CAG should be expanded to include consumer representatives, equipment retailers, additional competing manufacturers, and local franchising authorities. Further, the Commission should wait to review the amended EIA/ANSI 563 standard before promulgating regulations demanding compliance with it. This will make reconciliation of the many competing interests in this proceeding, and the public benefits intended by Section 17, more likely. A complete solution to the many difficult compatibility issues confronted in this proceeding will be impossible if new standards and regulations are adopted prematurely.

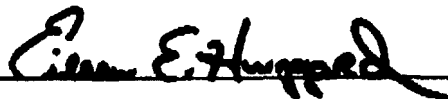
The City consequently recommends that the Commission consider fully the comments of parties who did not participate in the Compatibility Advisory Group. Such commentators include, for example: Circuit City Stores, Inc.; Titan Corporation; Multichannel Communication Sciences, Inc.; Mitsubishi Electronics America, Inc.; and the City of New York.

III. CONCLUSION

The City of New York respectfully urges the Commission to adopt the measures recommended in our previous comments, and to consider the issues raised in these reply comments. We believe that the adoption of these measures will promote the statutory objective, embodied in Section 17 of the 1992 Cable Act, of assuring that consumers "enjoy the full benefit of both the programming available on cable systems and the functions available on their televisions and video cassette recorders."

Respectfully submitted,

NEW YORK CITY DEPARTMENT OF
TELECOMMUNICATIONS AND ENERGY

By: 

Eileen E. Huggard
Assistant Commissioner
Cable Television Franchises
and Policy

Gary S. Lutzker
Telecommunications Policy
Analyst

75 Park Place
Sixth Floor
New York, New York 10007
(212) 788-6540

Dated: February 16, 1994

CERTIFICATE OF SERVICE

I, Mildred Engel, certify that on this 16th day of February 1994, copies of the foregoing Reply Comments of the New York City Department of Telecommunications and Energy were served by first class mail, postage prepaid, upon the persons on the attached service list.

Mildred Engel
Mildred Engel

Service List
ET Docket No. 93-7

Judith A. McHale
Barbara S. Wellberry
Discovery Communications, Inc.
7700 Wisconsin Avenue
Bethesda, MD 20814

Philip V. Permut
Waynes D. Johnsen
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

Aaron I. Fleischman
Fleischman & Walsh
1400 Sixteenth Street, N.W.
Sixth floor
Washington, D.C. 20036

David B. Goldstein
Natural Resources Defense Council
1350 New York Ave., N.W.
Washington, D.C. 20005

Jon F. Tuttle
Aldo Noto
Dorsey & Whitney
1330 Connecticut Ave., NW
Suite 200
Washington, D.C. 20036

Norman M. Sinel
Stephanie M. Phillips
William E. Cook, Jr.
Arnold & Porter
1200 New Hampshire Ave., NW
Washington, D.C. 20036

Dr. Ron D. Katznelson
Multichannel Communications
Sciences, Inc.
5910 Pacific Center Blvd., Suite 150
San Diego, CA 92121

Michael S. Schooler
Brenda L. Fox
Michael J. Pierce
Dow, Lohnes & Albertson
1255 23rd Street, NW
Suite 500
Washington, D.C. 20037

Robert J. Sachs
Howard B. Homonoff
Continental Cablevision, Inc.
The Pilot House
Lewis Wharf
Boston, MA 02110

Stephen R. Ross
Ross & Hardies
888 Sixteenth Street, N.W.
Washington, D.C. 20006-4103

Dick Glass
President
Electronics Technicians Assoc.
602 N. Jackson St.
Greencastle, IN 46135

Nicholas E. Worth
Telecable Corp.
Dominion Tower
999 Waterside Drive
Norfolk, VA 23510

Joseph Van Loan
Senior Vice President
Cablevision Industries Corp.
1 Cablevision Center
P.O. Box 311
Liberty, NY 12754

Martin T. McCue
General Counsel
United States Telephone Association
900 19th Street, NW
Suite 800
Washington, D.C. 20006-2105

Linda Kent
Associate General Counsel
United States Telephone Association
1401 H Street, NW
Suite 600
Washington, DC 20005-2136

Terry G. Mahn
Pamela J. Andrews
Walter Steimel, Jr.
Fish & Richardson
601 Thirteenth St., NW
5th Floor North
Washington, D.C. 20005

Floyd S. Keene
Pamela J. Andrews
Ameritech Operating Companies
Room 4H74
2000 W. Ameritech Center Dr.
Hoffman Estates, IL 60196-1025

Robert L. Dughi
AT&T
Room 3244J1
295 N. Maple Avenue
Basking Ridge, NJ 07920

James L. Casserly
Andrew W. Cohen
Squire, Sanders & Dempsey
1201 Pennsylvania Ave., NW
P.O. Box 407
Washington, D.C. 20044

William B. Barfield
BellSouth Telecommunications, Inc.
1155 Peachtree St., N.E.
Suite 1800
Atlanta, GA 30367-6000

M. Robert Sutherland
Michael A. Tanner
A. Kirvin Gilbert III
Bellsouth Telecommunications, Inc.
4300 Souther Bell Center
675 West Peachtree Street
Atlanta GA 30375

Ward W. Wueste, Jr.
Marceil F. Morrell
GTE Service Corp.
P.O. Box 152092
Irving, TX 75015-2092

James R. Hobson
Jeffrey O. Moreno
Donelan Cleary Wood & Maser, P.C.
1275 K Street, N.W. Suite 850
Washington, D.C. 20005-4078

Bruce Franca
Alan Stillwell
Office of Engineering &
Technology
Federal Communications
Commission
Washington, D.C. 20554

Julius Szakolczay
Manager, Engineering and
Advanced Development
Mitsubishi Consumer Electronics
2001 East Carnegie Avenue
Santa Ana, CA 92705

Walter Ciciora
Cable-Consumer Electronics
Compatibility Advisory Group
300 First Stamford Place
Stamford, CT 06902

Bruce Huber
Cable-consumer Electronics
Compatibility Advisory Group
1000 Milwaukee Avenue
Glenview, IL 60025

Natural Resources Defense Council
71 Stevenson Street
San Francisco, CA 94105

Jack J. Armstrong
Sanyo Manufacturing Corp.
333 Sanyo Road
Forrest City, AR 72335

Ronald J. Louie
City of Hillsboro
205 S.E. Second Avenue
Hillsboro, OR 97123

John S. Hoffman
Global Change Division
United States Environmental
Protection Administration
Washington, DC 20460

Kathryn A. Hutton
Ross & Hardies
888 16th Street, NW
Washington, DC 20006

Gardner F. Gillespie
David W. Karp
Hogan & Hartson
555 13th Street, NW
Washington, DC 20004

Bradley Stillman
Consumer Federation of America
1424 16th Street, NW
Suite 604
Washington, DC 20036

Ruth C. Rodgers
Home Recording Rights Coalition
2300 N Street, NW
Washington, DC 20037

Robert S. Lemle
Wilton J. Hildenbrand, Jr.
Cablevision Systems Corporation
One Media Crossways
Woodbury, NY 11797

Howard J. Symons
Gregory A. Lewis
Mintz, Levin, Cohn, Ferris
Glovsky and Popeo, P.C.
701 Pennsylvania Avenue, NW
Suite 900
Washington, DC 20004

Celeste M. Fasone
Board of Regulatory Commissioners
Two Gateway Center
Newark, NJ 07102

Arthur. J. Steinhauer
Sabin, Bermant & Gould
350 Madison Avenue
New York, NY 10017

Nick Hamilton-Piercy
Rogers Cablesystems Ltd.
One Valleybrook Drive
5th Floor
Don Mills, Ontario
Canada M3B 2S7

Albert Sawyer
Martha Drake
North Carolina Consumers
Council, Inc.
P.O. Box 3401
Chapel Hill, NC 27514

Herbert H. Lippold
Paul W. D'Arcy
Sanyo Fisher Corporation
21350 Lassen Street
Chatsworth, CA 91311

Victor Nicholson
Buss, Inc.
5225 Pooks Hill Road
Suite 1704-S
Bethesda, MD 20814

International Transcription Service
2100 M Street, NW
Washington, DC 20036

Lawrence A. Fineran
3740 A Madison Lane
Falls Church, VA 22041

Geoffrey Pruett
President
Oregon Prof. Elec. Assoc.
4505 S.E. Belmont
Portland, OR 97215

Bob Madigan, CET
President
Arizona State Elec. Assoc.
2822 N. Stone Avenue
Tucson, AZ 85705

Pete Block
Bang & Olufsen
Western Regional Training
10122 Colima Avenue
San Ramon, CA 94853

Ralph A. Smith
Executive Secretary
Oregon Consumer League
P.O. Box 8934
Portland, OR 97207

Michael E. Glover
Bell Atlantic Telephone Co.
1710 H Street, N.W.
Washington, D.C. 20006